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1 As acknowledged by this Court, Defendant Chase caused an Assignment of the Deed of
 2 Trust to be recorded **after** the Vawters filed their case. *See*, Declaration of Matthew Sullivan
 3 (Dkt. 12). Under the requirements of the DTA, it is the “beneficiary” who has the power to
 4 appoint the Successor Trustee. RCW 61.24.010(2). “Beneficiary” is defined as: holder of the
 5 instrument or document evidencing the obligations secured by the deed of trust, excluding
 6 persons holding the same as security for a different obligation.” RCW 61.24.005. The
 7 “premature” Appointment of Successor Trustee document was recorded in the records of King
 8 County, Washington on April 28, 2009. Based this “premature” appointment, Defendant QLS
 9 initiated the Vawters’ foreclosure sale on May 28, 2009. Further, the Appointment of
 10 Successor Trustee document supposedly making the appointment was actually done by an
 11 employee of Lender’s Processing Services, Christina Allen, as demonstrated by the deposition
 12 transcript provided to this Court by counsel for the Vawters. *See*, Declaration of Greg Allen
 13 filed in support of the Motion for Summary Judgment filed by Defendant Lender’s Processing
 14 Service, in *Bain v. Metropolitan Mortgage Group*, Case No. CV-09-00149-JCC (U.S.D.C.
 15 Western Dist. WA), a true and correct copy of which was attached to the Declaration of
 16 Melissa A. Huelsman. (Dkt.).

17 The “corrective” documents recorded in King County by Chase include an Assignment
 18 from MERS to Chase which was recorded on October 9, 2009. Sullivan Dec. (Dkt. 12). In
 19 connection with its Motion for Judgment on the Pleadings, this Court took notice of the newly
 20 executed and recorded Appointment of Successor Trustee document signed by Jeanni D. Lowry
 21 (title not identified) on January 13, 2010 on behalf of JP Morgan Chase Bank, National
 22 Association. As Chase conceded at oral argument, this document was executed for the sole
 23 purpose of “correcting” the improper foreclosure which Chase had already initiated. Thus, at
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1 the time that the Vawters brought suit to stop the foreclosure sale, Defendant QLS had not been
 2 properly appointed as the Trustee as required by the Deed of Trust Act. Further, the Vawters
 3 obtained a temporary restraining order from the King County Superior Court prior to the
 4 removal of this case to the federal courts. Thus, the Vawters were the prevailing parties for
 5 purposes of the requirements of the Deed of Trust Act in stopping a wrongfully initiated
 6 foreclosure sale. Although this Court found that the Vawters were not damaged by the actions
 7 of Defendant QLS related to the foreclosure, the simple fact is that they successfully stopped
 8 the sale and it had to be “corrected” by Defendants Chase and MERS only after the Vawters
 9 filed suit. Thus, the Vawters were entitled to their attorney’s fees and costs, not the other way
 10 around.

12 **ARGUMENT**

13 Defendant QLS is correct that under American law, the only time an award of
 14 attorney’s fees is permitted is when a statute provides for it or if there is a contract provision.
 15 Aleyska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247, 95 S. Ct. 1612, 44
 16 L.Ed. 141 (1975). However, no such contract existed between the Vawters and Defendant QLS
 17 at the time that this lawsuit was initiated and none of the causes of action herein are related to
 18 the contract as it later amended by Defendant Chase, when it correctly appointed Defendant
 19 QLS as the trustee. The Vawters did not amend their Complaint nor allege any wrongdoing by
 20 Defendant QLS once the Successor Trustee was properly appointed and thus cannot be liable
 21 based upon a later amendment to the contract.

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27 PLTFS’ RESPONSE TO MOTION FOR ATTORNEY’S FEES

- 3

Case no. 09-1585 JLR

LAW OFFICES OF
MELISSA A. HUELSMAN, P.S.
 705 SECOND AVENUE, SUITE 1050
 SEATTLE, WASHINGTON 98104
 TELEPHONE: (206) 447-0103
 FACSIMILE: (206) 447-0115

1 A. At the time that the Vawters initiated this lawsuit, Defendant QLS was not the "trustee"
 2 and therefore was not a party to the Deed of Trust.

3 By the admission of all of the Defendants herein, Defendant QLS was not appointed as
 4 the successor trustee when the Vawters initiated their lawsuit. It was appointed as the
 5 successor trustee months after they filed suit and after the case had been removed to federal
 6 court. Thus, to the extent that it can be construed as being a party to the contract as a Successor
 7 Trustee, it became so after the fact and that does not form the proper basis for an award of
 8 attorneys' fees in this case.

9 Further, Defendant QLS cannot properly assert that it is entitled to attorney's fees under
 10 Washington state law based upon RCW 4.84.030. None of the case law interpreting that
 11 statutory provision and cited by Defendant QLS discuss the ability of an agent of one of the
 12 parties to obtain attorney's fees. Defendant QLS is correct that the Deed of Trust only provides
 13 for an award of attorney's fees to the "Lender". Deed of Trust, ¶26. Necessarily the Trustee
 14 may only act on behalf of the Lender, according to the requirements of the Deed of Trust and
 15 the DTA, and thus is an agent of the Lender under the contract. The case of Kezner v.
 16 Landover Corp., 87 Wn.App. 458, 466, 942 P.2d 1003 (1997) stands only for the proposition
 17 that the Lender can recover its attorney's fees under the contract. There is no mention of the
 18 trustee nor the trustee's right to recover its attorney's fees and there are no Washington cases
 19 which support such an assertion. Defendant QLS was not a party to the Deed of Trust at the
 20 time that the lawsuit was filed, and it is not entitled to any attorney's fees under the terms of the
 21 contract nor under any of the language in the DTA. This Court held in its Orders dismissing
 22 their claims, that had the Washington Legislature intended to allow borrowers to bring damages
 23 claims for violations under the DTA, it would have said so in the body of the statute. The
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1 Vawters strongly disagree with this analysis of the DTA, but certainly the same logic must be
2 applied here by the Court. The Washington Legislature did not add any language to the Deed
3 of Trust Act which allows a foreclosing trustee to recover its attorney's fees and therefore none
4 should be awarded to Defendant QLS.

5 B. The attorney's fees requested are not properly authenticated.

6 Even if this Court is inclined to consider awarding attorney's fees to Defendant QLS, it
7 cannot do so because its attorney time records are unauthenticated except those of Ms. Stearns.
8 Copies of the billing records indicate that at least three attorneys worked on the matter, as well
9 as paralegals. The only person who signed the Declaration is Ms. Stearns, who can
10 authenticate her own time records and perhaps those of paralegals that she supervised;
11 however, she cannot authenticate the time records of other attorneys. It would be necessary for
12 those attorneys to authenticate their own time records, as Ms. Stearns would not have personal
13 knowledge about the work performed by other attorneys and/or paralegals that she did not
14 supervise. FRE 803(6). To the extent that this Court intends to award any attorney's fees to
15 Defendant QLS, it must do so based only upon those records which are properly authenticated.

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PLTFS' RESPONSE TO MOTION FOR ATTORNEY'S FEES

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Case no. 09-1585 JLR

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CONCLUSION

For all of the foregoing reasons, the Vawters maintain that this Court cannot grant Defendant QLS' Motion for Attorney's Fees. There is no statutory basis for such an award and it was not a party to the Deed of Trust when this case was initiated.

Dated this 16th day of May 2011.

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